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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

A reply brief on behalf of Appellants in any case is generally (and usually by necessity) rather sketchy and disjointed. Each topic hereinafter discussed will be appropriately catch-lined and numbered.[1-2]

[1] Wherever page numbers are mentioned without further designation, it will be understood as referring to such pages in Appellees' brief. Pages in the transcript of record will be referred to as usual (R. —). Pages from Appellants' original brief and other documents on file in this cause will be specifically designated.

[2] On page 2 of Appellees' brief, it is indicated that Appellees at the time of filing their brief did not have copy of Appellants' original brief. We presume this statement was an inadvertence, inasmuch as Appellees did have a copy of Appellants' brief, which fact is conclusively shown throughout Appellees' brief.

1. **Correct copying of Act involved.** The Act as copied and made Exhibit "A" to the complaint (R. 18) does not contain fully the title. Between the word "processing" and the word "agreements" the following language is omitted: "thereof, and the effect of contracts of sale and of marketing and processing". The correct title would then read: "AN ACT relating to citrus fruit; Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements." The same omission occurs where the Act is copied as Appendix "A" in the original brief for Appellants (See page 118, Appellants' brief). The importance of the omitted language is obvious.

The preamble to the Act, containing the legislative findings of fact, is also not copied correctly in all places. The opinion of the court set out the Act in its entirety with the exception of Sections 1 and 2, but in copying the preamble the following language is omitted in the third clause between the words "citrus fruit" and the words "in the State of Florida": "be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit". The same omission is, of course, contained in the copy of the opinion included as an Appendix to Appellees' brief on page 87 thereof. The importance of this omitted language from the preamble is likewise obvious.

For the convenience of the court, we append hereto, as Appendix "A", a complete and correct copy of the Act in its entirety.

It is interesting to observe that in the opinion of the Court declaring the Act unconstitutional, the Act itself was not correctly included. This undoubtedly was by inadvertence, but the omitted portion is vital as a finding of fact by the legislature. Several of the decisions sustaining various price fixing laws cited in Appellants' original brief were

grounded upon the very fact of insuring an adequate and dependable supply of the particular product involved in the law. See the extracts from the *nebbia* case, the *Hegeman Farms* case, and the *Agnew* case, quoted on pages 101, 103 and 106 of appellants' original brief. See also the case of *Borden's Farm Products Company* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453.

2. **Act operates prospectively only, not retroactively.** It is alleged in the complaint (R. 16) that one of plaintiffs, prior to the adoption of the Regulation by the Florida Citrus Commission fixing the cost price, "had entered into binding contracts with growers of grapefruit in the State of Florida, whereby the growers of grapefruit agreed to furnish to said plaintiff approximately 60,000 field boxes of grapefruit at a price less than 32 cents per field box". It is further alleged that, *because of such Regulation*, said plaintiff had "been unable to accept said 60,000 boxes of grapefruit at the price set forth in said contract" (R. 16-17). In the testimony Mr. Elder, manager of said plaintiff corporation, testified that such contracts called for the payment to the grower of "20 cents on the tree for the large and 15 cents on the tree for the small" (R. 64). He also testified that the Regulation caused him to lose the profits that he would otherwise have made in the processing of fruit purchased under such existing contracts (R. 64). The opinion of the Court also at least implies that the price agreed upon in the existing contracts would be abrogated upon the adoption of the Regulation, causing the canner a loss in the sale of his processed product to the distributor under other contracts (R. 80). From all of this appellees contend that the promulgation of the Regulation fixing the cost price at a figure higher than the purchase price contained in pre-existing contracts with the growers impairs the obligation of such contracts (R. 17, 35).

Appellants respectfully submit that there is no impairment of the obligation of contract. Previous contracts are, in no wise affected. The Act operates only prospectively. The Regulation of the Commission recording the cost of production operates only prospectively. The Regulation could not affect contracts already in existence. If the Act or Regulation presumed to do so, it would be operating retroactively.

But a careful consideration of the Act itself shows that it was *intended* to operate only prospectively. This Court will observe from the Act that it is provided that the *amount* due a grower under a contract for the sale of his fruit is determined by multiplying the number of packed boxes of fruit therein sold by the cost price recorded by the Commission "*current at the time*" the contract with the grower is made (R. 20). Thus if any canner had made a contract with the grower prior to the time the Regulation was adopted, *there would have been no cost price recorded by the Commission "current" at that time.* Such cost price would become current *only upon the adoption of the Regulation.* This being true, much of appellees' argument is taken completely out of the case.

3. **Canners cannot urge contentions of invalidity on behalf of growers not joined.** Much of the complaint, Appellees' brief, and even the opinion of the Court, is devoted to the contention that the Act is invalid because of its effect upon the grower. The Court in its opinion even posed the hypothetical case of the grower with his $10,000 crop of grapefruit (R. 80).

The principle is established that the question of constitutionality can be raised only by one who is affected by the alleged unconstitutional law and *in the particular features of the law complained of.* Many cases are collected in *11 American Jurisprudence,* pages 748 *et seq., 6 Ruling Case*

Law, pages 89 *et seq.*, and in the *United States Supreme Court Digest*, Volume 8, pages 5737, *et seq.* In *Bourjois, Inc.* v. *Chapman et al.*, 301 U. S. 183, 57 S. Ct. 691, a manufacturer of cosmetics in New York, with customers in Maine, assailed a Maine statute regulating the sale of cosmetics, requiring a license of salesmen, etc., on the ground that it interfered with interstate commerce, but that point was overruled, and then the Court said:

> "Plaintiff urges that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violate the Constitution of Maine. To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress."

In *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86, 54 S. Ct. 575, a gasoline distributor assailed a statute of Iowa levying an excise tax on gasoline. The Court said:

> "One who has not imported gasoline or distilled it from imported oil cannot complain that statute imposing license fee on imported gasoline is discriminatory."

In *Williams et al.* v. *Riley*, 280 U. S. 78, 50 S. Ct. 63, a law of California imposing a tax on motor vehicle operators was assailed by an operator of vehicles on the California highways, but the Court held that the plaintiffs, constituting only some of thosuands of people similarly situated, could not raise the question that the effect of the law was to exact tolls for the use of the highways, etc., saying:

> "Federal courts have no power per se to review and annul acts of state Legislatures on ground that they

conflict with federal or state Constitutions, but such questions may be considered only when justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest on such acts."

In *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 35 S. Ct. 167, a statute of the State of Ohio discriminating between shops employing five or more and those employing less than five, was involved. The suit was brought by an employer. The Court said:

> "The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employee in a shop with five employees with those having less. *No employee is complaining of this act in this case.* The argument based upon such discrimination, so far as it affects employees by themselves considered cannot be decisive; for it is the well-settled rule of this court that it *only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.*" (Italics ours.)

This is exactly what the canners in the instant case undertake to do on behalf of the growers.

In *Williams* v. *Walsh*, 222 U. S. 415, 32 S. Ct. 137, an Act of Kansas making it criminal to sell or deliver black powder for use in any coal mines in the State except in original sealed packages containing 12½ pounds of powder, was involved. The Court held that:

> "One who does not appear to have imported black powder from outside the state cannot raise the ques-

> tion of the validity under the commerce clause of the Federal Constitution of the provisions of Kan. Laws"—

involved. In the body of the opinion the Court, among other things said:

> "The act does not deal with importations, special or general, but only with sales within the State at a specified place, and the delivery at such place of the powder sold in other than a prescribed quantity and in a prescribed package,"

and that such packages might be prepared within the State or imported. See also *Meyer Const. Co.* v. *Corbett*, 7 F. Supp. 616.

And in *Detroit, Ft. W. & B. I. R. Co.* v. *Osborn*, 189 U. S. 383, 23 S. Ct. 540, 47 L. Ed. 860, it was held that the contention that a statute failed to provide for due notice to those who may be affected by its provisions and hence violated the Constitution, could not be raised by a person who had actually received notice.[3] There is no showing, contention or intimation anywhere in the transcript of record or in Appellees' brief that Appellees, or any of them, did not actually have notice and opportunity to be heard at and before the time the Regulation was adopted. In point of fact, the Appellees not only had such notice and opportunity for hearing, but actually participated in the investigation made by the Commission in arriving at the cost price.

4. **Considerations of questions of local law.** Appellees devote a section of their brief, pages 13 et. seq., to the proposition that the Court was not confined to considera-

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[3] This holding is doubly applicable to the instant case in that it also answers the elaborate contention made in Appellees' brief, at pages 54 et seq., that the Act is unconstitutional because it does not specifically provide for notice and hearing before adoption of the Regulation by the Citrus Commission. See infra, p. 30.

tion of the constitutional questions, but was at liberty to determine other questions of State or local law, even though the constitutional questions be decided adversely to Appellees or not decided at all. Appellees suggest three distinct questions of local law which it is contended the Court had jurisdiction to consider and which would warrant the injunctive relief sought from the three-judge court (page 14). These questions are elaborately argued (pages 77 to 85). Appellants submit that in this particular case the Court was without jurisdiction to consider such questions of local law for the following reasons:[4] (a) the requisite jurisdictional amount was not shown to be involved; (b) the Federal questions presented were not substantial; (c) even if the Federal questions were substantial, the Federal and local grounds were not in support of a single cause of action, but presented two separate and distinct causes of action; and (d) the local questions were not sufficiently raised in the complaint to enable the Court to consider them.

(a) THE REQUISITE JURISDICTIONAL AMOUNT WAS NOT SHOWN TO BE INVOLVED. We will not burden the Court on this point as the matter is fully covered in appellants' original brief (see pages 50 to 63 of appellants' brief). If appellants are correct in this contention, the District Court, of course, had no jurisdiction even to decide the Federal questions and therefore was precluded from deciding the local questions.

(b) THE FEDERAL QUESTIONS PRESENTED WERE NOT SUBSTANTIAL. Appellees (on page 13) cite four cases to sustain their contention that the District Court could consider and determine local questions. An analysis of these cases,

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[4] We here only consider the *right* of the Court to proceed to consideration of the local questions. What such determination on the merits should have been is hereinafter discussed, infra, p. 37.

together with consideration of other cases to be cited by appellants, will demonstrate that, even under such cases, the lower court should not have proceeded past the constitutional questions.

In the *Fisher* v. *Brucker* case, 41 F. (2d) 774, the District Court acquired jurisdiction upon two grounds, viz: (1) diversity of citizenship and (2) the presence of a Federal question. The Federal question presented raised the constitutionality of a State inheritance tax statute of Michigan. It was urged that the law was in conflict with the Fourteenth Amendment. A consideration of the opinion shows that the Federal question was substantial and in any event the Federal court acquired jurisdiction on the ground of diversity of citizenship.

The *Sterling* v. *Constantin* case, 287 U. S. 378, was an appeal from a permanent injunction issued by a three-judge District Court against the governor and other officials of the State of Texas. The governor had proclaimed "martial law" in certain oil producing areas in Texas and the injunction restrained the enforcement of certain military or executive orders restricting the production of oil in such areas. The governor and other State officials contended that certain sections of the State Constitution authorized the issuance of the executive proclamations. Plaintiffs in the case denied that the constitutional provisions authorized such action by the governor and urged that a construction of such provisions would demonstrate that no such authority was conferred. It was also urged that even if such constitutional provision did authorize the action taken by the governor, the executive order so issued thereunder violated rights of the plaintiffs under the Federal Constitution. Thus, both matters of Federal law and of State law were presented. This Court was urged to construe the State Constitution as a matter of local law, but the Court,

in opinion of Mr. Justice Hughes, refused to do so in the following language (287 U. S. text 396):

> "While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, it is still a matter of local law, as to which the courts of the State would in any event have the final word. We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees. We pass to the consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the state authorizes what the Governor has done."

Further in the opinion the conclusion of this Court on the constitutional question was stated as follows (287 U. S. text 404):

> "• • • as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction."

Thus this Court in the *Sterling* case specifically declined to pass upon the question of local law presented, but restricted its consideration to the Federal question.

The *Rice & Adams* v. *Lathrop* case, 278 U. S. 509, was a patent infringement case and is in nowise applicable to the particular point here involved.

The *Louisville & Nashville R. R. Co.* v. *Garrett* case, 231 U. S. 298, approaches the point more closely than any of the other three cases cited by appellees. In that case suit was brought in the District Court to enjoin the enforcement of certain orders made by the Railroad Commission of Kentucky prescribing maximum freight rates for certain intrastate traffic, and awarding amounts in reparation for pre-

vious excessive payments made to the carrier. The orders were made by the Railroad Commission under authority of a Kentucky statute. The bill attacked the statute and the orders of the Commission as violative of rights secured by the Federal Constitution. Objections were also made under the Constitution and statutes of the State. A three-judge District Court denied the motion for interlocutory injunction as to the right to consider the questions of local law, towit, the validity of the statute and orders under the State Constitution. This Court in opinion of Mr. Justice Hughes said (231 U. S. text 303, *et seq.*):

> "Because of the Federal questions raised by the bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. Siler *v.* Louisville & Nashville R. R., 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution and the *question of unconstitutionality, in this sense, must be a substantial one.* But where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here." (Italics ours)

But the Court further said (231 U. S. text 305):

> "So far as we are advised, the Court of Appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a State statute to be in conflict with the constitution of the State before that question has been considered by the State tribunals—to which it properly belongs—unless the case imperatively demands such a decision. Pelton *v.* National Bank, 101 U. S. 143, 144; Michigan Central R. R. Co. *v.* Powers, 201 U. S. 245, 291. Here, the argument against the statute is not of that compelling character."

In addition, however, to the four cases cited by appellees, certain other late decisions of this Court lend clarity to the point involved. These cases are *California Water Service Co.* v. *Redding,* 304 U. S. 252, 58 S. C. 865; *Levering & Garrigues* v. *Morrin,* 289 U. S. 103; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Noriembega Co.* v. *Bennett,* 290 U. S. 598, and *Bianchi* v. *Morales,* 262 U. S. 170, 43 S. Ct. 526.

In the *California Water Service Company* case, suit was brought in the District Court to enjoin the City of Redding, California, from receiving a grant of money from a Federal authority acting under the National Industrial Recovery Act and supplemental legislation, the purpose of which grant was to aid the City in the construction of a Municipal Waterworks system. It was urged that the grant of Federal funds and the legislation authorizing the same were invalid under the Federal Constitution and that the grant of funds was in violation of the Federal statutes cited. The suit also sought to enjoin the City from expending proceeds from the sale of the City's bonds, which bond issue was challenged as invalid under the Constitution and Statutes of California. After the suit was filed, but before the hearing before the three-judge District Court upon motion

for interlocutory injunction, this Court handed down decision in the case of *Alabama Power Company* v. *Ickes*, 302 U. S. 464, which determined the Federal questions adversely to the plaintiffs in the *California Water* case. The District Court held that the Federal question *had become unsubstantial* in view of the *Alabama Power Company* decision and therefore "the charge that the bonds of the City were invalid under the State law presented a purely local issue which the court was not required to consider," 304 U. S. text 254. Upon appeal to this Court the question of the right of the District Court to consider the matters of local law was considered and ruled upon as follows (304 U. S. text 254):

> "We are of the opinion that these rulings were correct. We have held that § 266 of the Judicial Code does not apply *unless there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described.* It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, *to scrutinize the bill of complaint to ascertain whether a substantial Federal question is presented,* as otherwise the provision for the convening of a court of three judges is not applicable. Ex parte Buder, 271 U. S. 461, 467; Ex parte Poresky, 290 U. S. 30. We think that a similar rule governs proceedings under § 3 of the Act of August 24, 1937, as to the participation of three judges in passing upon applications for injunctions restraining the enforcement of Federal statutes upon the ground of constitutional invalidity. Had the decisions in the cases of Alabama Power Co. *v.* Ickes, *supra,* and of Duke Power Co. *v.* Greenwood County, 302 U. S. 485, been rendered prior to the filing of the bill of complaint in the instant case, *no substantial Federal question would have been presented. The lack of substantiality in a Federal question may appear either because it is obviously without merit or because its unsoundness so clearly*

results from the previous decisions of this Court as to foreclose the subject. Levering & Garrigues Co. *v.* Morrin, 289 U. S. 103, 105, 106. And, here, although the bill of complaint had been previously filed, and a motion for an interlocutory injunction presented, *it was apparent after our decisions in the cases cited that the Federal question was without substance* and it became the duty of the District Court to dismiss the bill of complaint upon that ground.

In Oklahoma Gas & Electric Co. *v.* Oklahoma Packing Co., 292 U. S. 386, 391, we had occasion to observe that 'the three judge procedure is an extraordinary one, imposing a heavy burden on Federal courts with attendant expense and delay'; that 'that procedure, designed for a specific class of cases, sharply defined, should not be lightly extended'; and that restrictions placed upon appellate review in this Court 'would likewise be measurably impaired were groundless allegations thus to suffice.' We concluded that 'when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed.'

It is also clear that the presentation of a local question in the instant case as to the invalidity of the City's bonds under the State law did not suffice to save jurisdiction. While, if the court had jurisdiction by reason of the presence of a substantial Federal question, it could proceed to pass upon the local issue (Louisville & Nashville R. Co. *v.* Garrett, 231 U. S. 298, 303; Davis *v.* Wallace, 257 U. S. 478, 482; Sterling *v.* Constantin, 287 U. S. 378, 393, 394; Railroad Commission *v.* Pacific Gas & Electric Co., 302 U. S. 388, 391), *it was the presence of the Federal question which gave the court that authority, and in its absence, through lack of substance, the court was not entitled to go further.* In Norumbega Co. *v.* Bennett, 290 U. S. 598, the District Court of three judges, considering that a Federal constitutional question was involved, passed upon the question of the construction of the State statute and, denying a motion to dismiss for lack of jurisdiction, dismissed the bill

of complaint for want of equity. 3 F. Supp. 500, 502. This Court reversed the decree and remanded the cause with directions to dismiss the bill of complaint for the want of jurisdiction because of the absence of a substantial Federal question.

We think that the Act of August 24, 1937, did not contemplate that a court of three judges should be convened, or, if convened, should continue to act, *merely for the decision of a local question where no substantial Federal question is involved.* We agree with the District Court that the attempt to blend the contention as to the validity of the bond issue under State law with the question as to the authority to make the Federal grant under the Federal statutes, so as to give the former the aspect of a Federal question, is unavailing. The local question and the Federal question are distinct. See Hurn *v.* Oursler, 289 U. S. 238, 245, 246. (Italics ours.)

It is unnecessary to quote from the *Levering* case or the *Oklahoma Gas & Electric Company* case or the *Noriembega Company* case as the substance of the holding in those cases is contained in the *California Water Company Service* opinion, supra. The *Bianchi* case substantiates the the holding in the *Levering* case to the effect that *prior decisions of this Court deciding adversely the Federal questions sought to be presented will cause such questions to be unsubstantial and merely colorable.* To the same effect see *Hannis Distilling Company* v. *Baltimore*, 216 U. S. 285; *McGilora* v. *Ross*, 215 U. S. 70, and *Norton* v. *Whiteside*, 239 U. S. 144.

Thus it will be seen from the foregoing cases that where the Federal questions are *obviously without merit*, or have been clearly decided adversely *by prior decisions* of this court, such questions are without substance and do not confer jurisdiction upon the District Court to permit consideration of questions of local laws sought to be presented.

In the *Levering* case, *supra,* it was held that the substantiality of the Federal question must be determined by the allegations of the complaint and not upon the facts as they may turn out, and that if the claim pleaded is plainly unsubstantial, jurisdiction is wanting. A consideration of the Federal questions alleged in the *Levering* case resulted in a dismissal of the suit because such questions had been previously decided by this Court.

Applying the doctrine of the foregoing cases to the allegations of the complaint in the instant case, it will be seen that the Federal questions were not substantial and that the Court thereby was not warranted in proceeding to a consideration of any local questions. The claims advanced under the Federal Constitution have been exhaustively argued in appellants' original brief and it is unnecessary to do more than to refer to the same here to show that each of the claims had been already decided adversely by this Court.

The interstate commerce question had been decided in the *Eisenberg* case and the *Townsend* v. *Yeomans* case, among others cited in appellant's brief, as well as by the *Arkadelphia Milling Company* case, hereinafter cited (see *infra* pages 23-24).

The question of discrimination had been decided by this Court in the *Ten Eyck* case, the *Currin* v. *Wallace* case, and the *Rock Royal Co-Op.* case, among others cited in appellants' brief.

The due process question had been previously decided by this Court in the *Munn* case, the *O'Gorman & Young* case, the *Nebbia* case, the *Hegeman Farms* case, the *West Coast Hotel Company* case, the *Townsend* v. *Yeomans* case, and *Agnew* case, all cited in appellants' brief.

So it is submitted that the Federal questions presented had been previously determined by this Court adversely to

Appellees, and the Court had no authority to proceed to consideration of the local questions.

(c) EVEN IF THE FEDERAL QUESTIONS WERE SUBSTANTIAL, THE FEDERAL AND LOCAL GROUNDS WERE NOT IN SUPPORT OF A SINGLE CAUSE OF ACTION, BUT PRESENTED TWO SEPARATE AND DISTINCT CAUSES OF ACTION. In *Hurn* v. *Oursler*, 289 U. S. 238, this Court laid down a corollary rule respecting the right of the District Court to consider local questions as well as Federal questions. In that case it was held that even though the Federal question *was substantial*, although adversely decided, it did not *necessarily* follow that the Court had jurisdiction to proceed to the local questions. The limits within which the power could be exercised was carefully charted. Referring to the previous case of *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, this Court in the *Hurn* case said (289 U. S. text 243, 245):

> "This Court held (referring to the Siler case) that the circuit court, having acquired jurisdiction by reason of the federal questions involved, 'had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.' • • •
>
> But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action."

This Court observed that the particular questions of local law and of Federal law involved in the *Hurn* case "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U. S. text 246).

An application of the *Hurn* case to the instant case will reveal that the Court was without jurisdiction to proceed to the local questions because the Federal and local questions presented two separate and distinct causes of action and were not merely two distinct grounds in support of a single cause of action. The *constitutional* questions were directed against the statute. The *local* questions were directed to the procedure of the Commission in promulgating the Regulation. The facts relied upon to sustain one were entirely different from the facts relied upon to sustain the other. One involved matters of substance; the other involved mere matters of procedure. It seems clear that the two claims presented distinct causes of action.

(d) THE LOCAL QUESTIONS WERE NOT SUFFICIENTLY RAISED TO ENABLE THE COURT TO CONSIDER THEM. It was alleged that the Florida Citrus Commission, when it promulgated the Regulation, did not have before it petitions signed by the required owners of producing acreage of citrus fruit in Florida (R. 11-12). Such allegation is insufficient because it merely makes denial in the general terms of the statute. It is not denied that the Commission did not have some petitions before it, and if so, the percentage of such petitions is not alleged. The averment is merely a conclusion without any facts alleged to support the contention of non-compliance. Furthermore, the allegation does not even deny that the Commission had before it petitions signed by owners of 50% or more of the producing acreage of *grapefruit* in Florida. The Resolution on its face avers such fact (R. 31) and the complaint does not dispute it. The com-

plaint merely avers that there were no petitions from 50% of the owners of producing acreage of *citrus fruit* in Florida. The Act itself permits its provisions to be applied "to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section" (R. 20). Only grapefruit was involved in the Regulation of the Commission. Therefore, even the general averment of the complaint could be true and still strict compliance with the Act with reference to grapefruit not be denied. So this matter of local law was not sufficiently raised.

It was further alleged that the Commission did not determine the percentage of acreage on the basis of proper surveys, (R. 12). It is obvious from the Act, particularly Section 4 thereof, that whatever petitions or agreements must be presented to the Commission, before the Regulation is adopted, refer to and embrace only the particular variety of citrus fruit covered by the Regulation. This being so, the averment is insufficient because it does not confine the non use of proper surveys to grapefruit. The complaint refers to "citrus fruit". Moreover, it is not alleged *what* surveys in fact were relied upon by the Commission, and it is not denied that the Commission used *some* kind of surveys as a basis for its action. The averment is a mere denial in the very general terms of the Act. No facts are alleged sufficient to present a justiciable issue.

It is alleged that the Commission did not procure from producers or handlers not subject to the Act, proper agreements to conform to the Regulation (R. 12). This averment also is in the nature of a conclusion with no facts stated to support it. Also a copy of the Regulation is attached to the bill made a part thereof (R. 31) which contains a finding by the Commission that *all* citrus fruit dealers handling grapefruit grown in the State of Florida were subject to the provisions of the Act and the complaint does not deny

such finding. The complaint does not deny that there were *no producers, shippers or handlers* not subject to the Act. It is merely alleged that *no agreements* were procured. Certainly if there were no persons from whom such agreements should be procured, there would be no agreements procured. This allegation does not raise sufficiently a question of non-compliance by the Commission.

It was contended that the Commissioner of Agriculture had no legal authority to revoke the licenses of appellees as citrus fruit dealers because of violation of the Growers' Cost Guarantee Act (R. 15-16). This contention is not available to appellees because a copy of the Bond and License law is attached to the complaint (R. 20-31) and shows clearly that under such circumstances it was not only the right, but the express duty, of the Commissioner to revoke such licenses. This point was covered by pages 115 and 116 of appellants' brief. The Bond and License law was by reference made an express part of the complaint (R. 11), and being a part of the complaint effectually neutralized the contention made in the body of the complaint that the Commissioner lacked authority in the manner specified.

Thus the allegations of the complaint were insufficient to properly raise the local questions even if the Court otherwise had jurisdiction to proceed past the Federal questions.

5. **Interstate Commerce.** Appellees on page 44 take issue with the quotation made in appellants' brief, page 68, from *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004, to the effect that "Until such time as a commodity actually commences its journey from one State to another, the State in which the commodity is located has full jurisdiction to regulate its manufacture and production". Appellees characterize the above quoted language from this Court as "patently so narrow as to be incorrect", implying

that the *Chassaniol* case has been overruled by the *Stafford* case, the *Santa Cruz Fruit Packing* case and the *Fainblatt* case.

The *Santa Cruz* and the *Fainblatt* cases may be immediately disregarded because they both arise under the National Labor Relations Act. Congress had definitely invaded the field. Also the facts in both cases show that interstate commerce was directly affected. The *Stafford* case, aside from being an earlier case than the *Chassaniol* case, is clearly distinguishable. It concerned the constitutionality of the Packers and Stockyards Act passed by Congress to regulate the business of meat packers done in interstate commerce. There five large national meat packing establishments [5] had "for more than two decades conspired together to control the meat distribution business in the country" and had in fact suppressed competition and were virtually dictating prices. The Act was passed to deal with the evil as a National problem based upon an obstruction to interstate commerce. The Act was sustained on the same theory. The gist of the holding of this Court, in the opinion by Mr. Chief Justice Taft, is as follows (258 U. S. text 516):

> "The Act, therefore, treats the various stockyards of the country as great National *public utilities* to permit the flow of commerce from the ranges and farms of the west to the consumers in the east. It assumes that they conduct a business affected by a public use *of a national character and subject to national regulation.*"

So it is that the three cases cited by appellees do not modify the principles of the *Chassaniol* case. But a closer analysis of the *Chassaniol* case will reveal that it was

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[5] Swift, Armour, Cudahy, Wilson and Morris, called the "Big Five". 258 U. S. text 499.

founded *upon facts identical with the facts in the instant case.* The City of Greenwood, Mississippi, had by ordinance levied a tax upon every person in the business of buying or selling cotton for himself within the city. The ordinance and the statutes authorizing it were challenged under the commerce clause of the Federal Constitution. We quote from the opinion of Mr. Justice Brandeis holding the Act constitutional as not affecting interstate commerce (291 U. S. text 585):

"Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. All of the cotton there dealt in is grown and ginned in Mississippi. It reaches the Greenwood warehouses, about 70 per cent by rail, the rest by automobile, truck or wagon. There, it is compressed substantially as described in Federal Compress & Warehouse Co. *v.* McLean, *ante*, p. 17. Purchases and sales are made upon the market by transfer and delivery of receipts issued by the local warehouses under the United States Warehouse Act. The prices are governed largely by transactions on the cotton exchanges of New York, Chicago, New Orleans, and Liverpool.

There are at Greenwood about 25 cotton buyers, each of whom, like Chassaniol, purchases and sells cotton for himself. The buyer becomes the absolute owner. He makes the profit or bears the loss. But when he buys he customarily has in hand and in mind orders or contracts for that particular grade, for immediate or future delivery in other States or countries to the extent of about 90 per cent, on the average, of all cotton purchased by him. • • •

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is *destined* for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is

the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress Co.* v. *McLean*; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce.* Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, *or processed*, by them may be subjected to a property tax.

There is nothing in *Dahnke Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 or in *Lemke* v. *Farmer Grain Co.*, 258 U. S. 50, inconsistent with this conclusion. The regulations involved in those cases were found to impose a direct burden upon interstate commerce itself. *Stafford* v. *Wallace*, 258 U. S. 495, is also in harmony with the rule here applied. See *Minnesota* v. *Blasius*, 290 U. S. 1, 7-8." (Italics ours.)

Appellees (on page 45) attempt to distinguish the *Chassaniol* case by contending that, with the passage of the Growers' Cost Guarantee Act, the State of Florida "has attempted by statute to impose an arbitrary condition upon the sale of a product *destined* for interstate commerce". But we find from the opinion in the *Chassaniol* case that the identical argument was raised there and repudiated by the court. It was held that even though the product was "destined" for ultimate shipment to some other State or country, such fact did not necessarily cause interstate commerce to be affected or unduly burdened. The *Chassaniol* case is direct authority for Appellants' position here and Appellees have failed to distinguish it.

But if further authority were needed on the principle here contended for, we have but to cite the case of *Arka-*

delphia Mill. Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 39 S. Ct. 237, decided by this Court in March, 1919, in opinion of Mr. Justice Pitney. The *Arkadelphia* case is so nearly like the case at bar and the reasoning is so *apropos* as to seemingly silence all contention that the commerce clause is violated. The State of Arkansas had fixed a transportation rate upon rough material (logs, etc.), and the railroad made the point that, since the logs were transferred to the mill for the purpose of manufacture into lumber to be shipped in interstate commerce, the stated rough material rate was void. It appeared that 95% of the lumber from the mill was shipped out of the State. The court, in holding that the lower court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce, said (249 U. S. text 151):

> "It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion,"

citing a number of cases. This applies exactly to the canners who purchase grapefruit to be canned within the State and eventually sold wherever they can find a market.

The *Baldwin* v. *Seelig* case cited on page 45 by Appellees is distinguishable. In the *Baldwin* case the question was whether the New York Milk Control Act could be applied against a New York dealer who had bought milk from a creamery in Vermont, transported the same to New York, and sold in that State to customers. The court observed (294 U. S. text 519) that the Act had been previously upheld "in its application to producers doing business in New York State", but it was held the New York Act did not apply to transactions wherein the New York dealer had procured his milk from outside the State and hence in interstate commerce. The facts of the instant case, however, come within the rule of the *Nebbia* and other cases, rather than the *Baldwin* v. *Seelig* case. All the canners who brought the instant suit do business and have their canning plants in Florida (R. 1-3). The canners buy their fruit from Florida producers. The Act presumes only to cover transactions in Florida with the Florida producer. There is no case presented here where a Florida canner is buying grapefruit from an out of State producer. Thus the *Baldwin* v. *Seelig* case is wholly inapplicable.

Appellees on pages 53 *et seq.* contend that it is immaterial that Congress has not legislated on the subject covered by the instant Act for the reason that "the fixing of prices to be paid farmers and growers for their commodities which are sold throughout the United States is a matter that demands uniform regulation". Appellees rely upon the principle that even though Congress has not legislated, the States are still not free to legislate if the matter is one that demands uniform regulation throughout the country. The principle may be sound, but Appellees err in applying it to the facts here. No more universal commodity, produced and consumed, could be named than milk. Also Appellees' own complaint, as well as their own evidence, show

many different factors and conditions entering into the production of grapefruit in the various producing centers easily sufficient to eliminate the necessity for uniform regulation by Congress.

6. **Discrimination in favor of co-operative canners.** Appellees on pages 32 *et. seq.* insist that the Act discriminates against the Appellees as independent canners. The statement is repeatedly made that the Commissioner of Agriculture has construed the Act not to apply to the co-operatives. The evidence in the case directly refutes this (see pages 47 and 48, Appellants' original brief). Without repeating the argument already made in Appellants' original brief on the general question of discrimination, we may summarize briefly the answer to Appellees' contentions on the point:

(a) The Co-operatives come within the Act.

(b) If the Commissioner erroneously, but in good faith, omits to enforce the law against the Co-operatives, injunction is not the remedy and the complaint does not charge the Commissioner with bad faith.

(c) In the law exempted the Co-operatives it would not be invalid, since they constitute a separate class; so if the Commissioner fails to enforce the law against them because of an erroneous belief that they are exempt or otherwise, the Appellees, being in a separate class of independent canners, are not in position to complain. If they have any remedy at all it would be mandamus to compel enforcement as to all, rather than injunction to prevent enforcement as to any.

(d) The evidence is that the law was being enforced against all canners.

As to the proposition of Appellees on pages 78 and 79, that producers canning their own fruit are not subject to

the Act, and that the Commission did not require the producers to sign the agreements mentioned in the Act, a number of answers are apparent:

(a) Owners processing their own fruit are entirely without the scope of the Act. The Act applies only to *"agreements"* relating to sale, marketing and processing, and so long as a grower deals with his own fruit he is not affected.

(b) The grower canning his own fruit is obviously in a separate classification.

(c) The agreement which the Commission is required by Section 3 to obtain from those "not subject to the provisions of the Act" is that they will *"conform thereto and abide by its terms."* What are the "terms" referred to? The terms of the Act are that:

> "Every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production."

These are not such terms as any one person can conform to; they require a *"contract"* to bring them into operation. Subsequent language of the Act emphasizes this construction. Hence it is that the provision of the Act about obtaining an agreement is an absurdity and a nullity, and the Commission correctly found that there were no persons not subject to it.

(d) If we assume that

> "producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act"

are expected to agree that they will not buy or sell citrus fruit except in conformity with the Act it would still not preclude them from processing their fruit, and after that they sell canned goods and do not sell fruit at all.

7. **No denial of due process of law.** Appellees' argument on pages 26-27 that the Act is for the grower and against the general public is completely refuted by the preamble to the Act. The judiciary cannot convict the State legislature of false and fraudulent recitals in the preamble. Nor can the judiciary say that the facts and reasons set forth in the preamble are so manifestly non-existent as to invalidate the Act. Nor can the judiciary assume that the legislature did not give full consideration to all phases of the industry and to the interests of the public generally in the enactment of the law, at least in the absence of clear and convincing proof which does not exist here.

On page 34 Appellees deny the right of the State to take away from the owner his right to fix the sales price of his product. Many answers to this proposition suggest themselves. The Appellees here are not the owners of grapefruit, but are merely potential buyers thereof. Also, the right to fix prices for one's products is not absolute any more than the right of freedom of contract, but must yield to the paramount public interest, as declared in the many cases from this Court cited in Appellants' original brief.

Appellees attempt to take the instant case out of the rule of the *Nebbia* and other cases by contending that the citrus industry in Florida is not "a paramount or basic industry, nor one directly or materially affecting the public health, such, for instance, as the dairy industry" (page 27). But curiously enough, we find Appellees in the next breath referring to grapefruit as "a healthful food product, grapefruit" and the canned product to be "health producing fruit" (page 40). And that the citrus industry *is* "a

paramount and basic industry" is established both in fact and upon judicial authority of this Court.

Appellees (on page 30 and other pages) try to distinguish the instant Act from the New York and Virginia Milk Acts upheld by this Court, by contending that the Milk Acts were broad, comprehensive measures, regulating the entire industry affected, while the instant Act is merely an isolated price fixing act without presuming to cover all phases of the citrus industry. But appellees completely overlook the many other citrus regulatory laws of Florida in existence at the time the instant act was passed and at the time this case was filed. All of such acts taken together completely regulate every phase of the citrus business in Florida. While they are not all put into the same legislative enactment, they must all be construed *in pari materia* as constituting the general legislative program in the citrus field. It would unduly encumber this brief to present even briefly the provisions of these many State Acts. There are so many of them that each year the State Department of Agriculture, Citrus Inspection Bureau, publishes a revised book containing solely the citrus laws in force. Copies of this publication containing the citrus laws in force at the time the suit was instituted will be filed under separate cover as Appendix "B" to this reply brief, in order that this Court will have before it in the consideration of this cause all the various regulatory measures governing the citrus industry in Florida. Many of these acts were passed at the same 1935 legislative session at which the instant Act was passed. But whether at the same session or not, and whether passed before or after the instant Act, all these citrus laws must be taken and construed together as constituting the legislative program. When so construed they certainly cover all phases of the industry as completely as do the single Acts involved in the New York and Virginia Milk cases. And lastly, appellees advance no reason why, even if it stood

alone, the Grower's Cost Guarantee Act would not be valid.

Appellees again (on pages 35 and 36) make feeble effort to distinguish the instant Act from the milk laws and from the ticket broker Act involved in the *Tyson* case, by contending that in the latter cases the legislation merely fixed "maximum charges" or "maximum sales prices of milk or of other essential commodities". It is said that the Grower's Cost Guarantee Act "is not a maximum law but a minimum law and cannot be for the protection of the public or for a large number of the members of a community". In the first place, both the New York and Virginia Milk laws permitted the fixing of *minimum* as well as *maximum* prices to be paid to producers for milk. In the second place, grapefruit is within the class of an essential commodity, the same as milk, differing possibly only in degree. The legislature so found it, this Court has so declared it, and appellees elsewhere in their brief admit it.

8. **"Full hearing" before the Commission.** Appellees attempt to present to this Court an entirely new question not previously urged. It is said that the Regulation of the Citrus Commission is void because the Act authorizing it did not provide for notice or hearing, nor was any full hearing had by the Commission. It is significant that appellees are searching for points other than those relied upon in the lower court. But several answers are obvious to the proposition of "Notice and Hearing" attempted to be raised:

(a) The question is not raised in the complaint. Appellees on page 54 of their brief say their complaint charged "that the cost of production was not properly determined by the Florida Citrus Commission and that said Regulation constitutes a denial of the property rights of these appellees without due process of law (R. 13)". Even if the quoted language were an accurate appraisal of the complaint, such allegations would be too general to support a

contention that appellees were denied *notice and hearing* or that the statute failed to provide therefor. In the second place, a careful examination of the complaint itself (R. 13) shows that it is not susceptible to the reference thereto made in appellees' brief. The complaint at that point (which is the only place in the complaint relied upon by appellees as presenting the question) raises the due process proposition on the ground that the Citrus Commission adopted the cost price "as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission and that the said price is not the actual cost of production nor an average reasonable cost per standard packed box of grapefruit throughout the State of Florida; That among other things, the said 32¢ basis includes 9.8¢, considered by the Commission to represent interest on investment by the grower" (R. 13). This says nothing about notice and hearing, either in fact or as a provision of the law. Thus the complaint wholly failed to present the question now so elaborately argued by appellees. The point was not argued before the lower court.

(b) The record does not show that a hearing was *not in fact had* and the presumption must be indulged that the proceedings were regular and whatever should have been done was done by the Citrus Commission. It is true the Court in its opinion (without sustaining evidence) found that the Commission had not *procured certain required agreements* before adopting the Regulation, but the opinion does not show that the Commission did not accord *full hearing.*

(c) Appellees were not necessarily entitled to a hearing before recordation of the cost price. If any such hearing were required at all, it would have been for the benefit of the growers. The rights of appellees as potential buyers were not involved. And even if the growers or canners, or

both groups, *were* entitled to a hearing, and if it be further assumed that the Commission denied all of them a hearing, it is doubtful, under appellees' own authority (on page 57), whether such failure on the part of the Commission would deny due process. An emergency had already been declared by the Commissioner of Agriculture with the consent of the Governor. It was the height of the grapefruit producing season. There was an urgent necessity for action. In the authority cited on page 57 by appellees it is plainly stated:

> "In courts of law, notice and hearing precede the adjudication. In many administrative proceedings a similar principle is operative. But in the latter type of proceedings, *because of the urgency of public need* or because of practical considerations of administrative efficiency or effectiveness prior notice and hearing is not always feasible. *In such cases due process is afforded if the person whose property is affected is thereafter given an opportunity to test the validity or propriety of the administrative action.*" (Italics ours.)

But after all what was the Commission to determine? All the Commission was authorized or required to do was *to determine a fact*, to wit, "the average reasonable cost per standard packed box of producing citrus fruit" (R. 19-20). There was no trial between parties, there was no controversy between different groups in the industry. No judgment was to be entered, or even sought, against the canners. Only a simple fact was to be determined, and certainly the canner was not a necessary party to the determination of that fact. It was in the nature of a *proceeding in rem*. See *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 S. Ct. 200; *Leigh* v. *Green*, 193 U. S. 79, 24 S. Ct. 390; and *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779. If any parties at all were necessary, it was merely the grower group. The independent canners did not produce the fruit, therefore they could hardly throw any light on the cost of

production. We have again the canners virtually contending before this Court that the Act and Regulation are invalid because some right of the growers has been violated.

(d) It does not appear from the record that appellees *did not know* that the Citrus Commission had the question under investigation, or that they did not have opportunity to be heard, or that they were not in fact heard in the fixing of the cost price. In the absence of such showing this Court must assume that appellees did actually have notice. And if they had notice, the question is brought directly within the authority of *Detroit, Ft. Wayne & Belle Isle Railway* v. *Osborn*, 189 U. S. 383, 23 S. Ct. 540, 47 L. Ed. 860. In that case the legality of an order of the Commissioner of Railroads of the State of Michigan was challenged. We quote from the opinion of Mr. Justice McKenna (189 U. S. text 390):

> "The objection that the statute does not provide for notice seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the 'issue framed therein said cause went to a final hearing.' The cause was submitted on petition and answer, and the petition alleged 'that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order.' It is therefore not open to the plaintiff in error to complain that the statute does not provide for notice."

(e) If the right existed on behalf of the canners they have waived it in this proceeding. If appellees did not in fact receive notice, they are not in position to complain. So far as the record shows they made *no request for hearing.* They took no issue with the Commission *after* the order was entered. They made *no protest* that they had been denied hearing. They made *no application for rehearing or reconsideration of the order.* In fact, they waited over two months after the Regulation went into effect before they filed their complaint in court and even then did not complain of lack of notice of hearing. During all this time appellees fully acquiesced in the order so far as the record shows. In this connection see the "*Second Morgan* case," cited and relied upon by appellees in their brief, pages 71-73.

(f) Even if the statute does not specifically provide for notice and hearing, such provision may be, by implication, read into the statute and the Act rescued from invalidity upon that ground. This was the precise holding in *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765, relied upon by appellees in pages 70 and 71.

In *Buttfield* v. *Strahanan,* 192 U. S. 470, 24 S. Ct. 349, a Federal Act permitting the establishment of government standards of purity, quality and fitness for consumption of imported tea without notice to the importer thereof and even allowing his tea to be refused admission into the United States because inferior to such standards, was upheld as not denying due process of law. See also *United States* v. *Heinszen,* 206 U. S. 370, 27 S. Ct. 742.

Municipal ordinances fixing telephone rates have been held by this Court not to deny due process of law even though the municipal charter under which enacted did not expressly provide for notice of hearing, where both notice and an opportunity to be heard were in fact accorded.

Home Telephone & Telegraph Co. v. *Los Angeles*, 211 U. S. 265, 29 S. Ct. 50.

In *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 53 S. Ct. 522, it was held that due process was not denied even if the entry of judgment preceded the opportunity to present a defense.

And in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, it was held that due process does not require that opportunity be given before the entry of judgment to present a defense, but it is enough that it may be presented on appeal from the judgment.

The New York Milk Control Act upheld in the *Nebbia* case, 291 U. S. footnote page 519, permitted the State Board to

> "ascertain by such investigations and proofs *as the emergency permits*, what prices for milk in the several localities and markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk * * *."

(g) The argument made and cases cited by appellees beginning on page 59 with respect to the meaning of the word "determined" is fully answered by the fact that there is nothing uncertain in the price fixed by the Commission. It was a definite, set, fixed price, to-wit, 32¢ per standard packed box (R. 31-32). Likewise, the cases cited on page 60 holding that certain determinations made by State boards must be "declared in such a way that it may be known" is answered by the Regulation itself, which appellees affirmatively allege was passed by the Florida Citrus Commission on January 16, 1939 (R. 11).

(h) Appellees (on page 78) are wholly unjustified in accusing the Commission of refusing to accord a full hearing because "it was too much trouble and would take too

much time to comply with the Act." Where appellees get their facts to support such charge is not clear from the record. In the first place, the eleven members of the Citrus Commission are themselves experts in the citrus producing field. Under the provisions of the Act creating the Commission they must all be "practical citrus fruit men". They must all be growers of citrus fruit. They probably are in better position and are better qualified themselves from their own knowledge and experience to arrive at a cost price than any one else.

But the evidence in the record shows that the Commission was *unusually deliberate and painstaking* in the performance of its duty. The Chairman of the Commission says that as early as January 6, 1939 the Commission began its investigations (R. 41). He further says that on January 16, "after considering all the information available relating to the cost of production of grapefruit, which information included compilations of data supplied by the Chief Field Agent for the Commission, and the Agricultural Extension Service of the University of Florida, the Commission found, * * *" etc. (R. 42). The Chief Field Agent of the Commission stated that he gathered and compiled information from growers and shippers of grapefruit in Florida, used information available from various sources and consulted with and obtained information from the Department of Agricultural Economist, of the Agricultural Extension Service, University of Florida, at Gainesville, Florida, all of which was presented to the Commisison (R. 43). The Agricultural Extension Economist of the State University, who had studied extensively over a period of years the cost of producing grapefruit in Florida and had published bulletins and articles on the subject, made available to the Commission all information and data collected by his Extension Service (R. 44).

9. **Right of Commissioner to revoke licenses.** Appellees on pages 82 and 83 insist that the Commissioner of Agriculture "is without authority to revoke the licenses of Appellees because of their failure to comply with the Grower's Cost Guarantee Law". The provisions of the statutes were pointed out to this Court in Appellants' original brief on pages 115 and 116. It was shown that under the Bond and License law, it was not only the Commissioner's *right* to revoke the licenses, but it was his positive *duty* so to do, if appellees, as citrus fruit dealers, violated the provisions of the cost price law. But appellees advance the unique contention that a violation of the cost price law does not come within the Bond and License law because the former was enacted by the legislature after the latter, although at the same session of 1935. Such contention is so untenable that it betrays a significant desperation on the part of appellees. The Bond and License law uses the language "any of the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers" (R. 27). This provision was without limitation. In fact, to have confined it to prior citrus laws would have been to create grave doubts as to constitutionality of the law. In the second place, even if appellees' far-fetched argument were sound, it would have to fall because of the fact that the 1937 legislature reenacted the Bond and License Act, and the 1937 law was in effect at the time this suit was instituted. Appellees even show this on the face of their own complaint. (R. 20). Further argument is superfluous.

Likewise without merit is the argument of appellees on page 83 that the cost price law "provides no penalties whatsoever for violations thereof, but merely creates a liability on the purchaser of citrus fruit * * *." While not material to this case, the Act denounces as unlawful "any contract, plan, scheme or device", attempting to preclude the grower from receiving his cost price, and also requires

any person "buying, marketing or processing" citrus fruit from the grower to pay the grower his cost of production (R. 20). Failure on the part of any processor to obey such terms of the statute would clearly constitute a violation of law on the part of such processor. The mere fact that no specific criminal penalties or punishment is provided in the Act does not at all relieve the transgressing dealer from criminal prosecution. The statutes of Florida expressly provide for punishment in cases of criminal violation where specific punishment is not set forth in the Act denouncing the offense. Section 7104, Compiled General Laws of Florida, 1927.

10. **Interlocutory injunction should not have been granted.** Appellees on pages 14 *et seq.* contend that the interlocutory injunction, in effect, was merely a routine order in the case to preserve the *status quo* of the subject matter until final hearing and that the Court did not intend or presume to pass upon merits of the case. But Appellees can not get away from the plain showing of the record. While Appellees say that "in substance, the Court said that it appeared to it that the Appellees would suffer irreparable damage unless the injunction was issued, and the court, therefore, concluded that the injunction should be granted", in the very next breath Appellees admit that "when the opinion was later filed, it consisted of findings of fact and conclusions of law * * *" (page 15). It is admitted on page 15 that the opinion *gave the reasons of the Court* for the granting of the interlocutory injunction. And the Court in its opinion mentioned nothing about irreparable damage or any of the other matters which should properly have been considered on interlocutory application. The opinion concerns itself only with the ultimate merits of the case. And if such matters constituted the easons for the issuance of the interlocutory order, it cannot be success-

fully urged that the Court was moved by any other consideration. The order must stand or fall upon the reasons which the Court assigned for its issuance. It must be assumed that if the Court was actuated by other considerations than the merits of the case, it would not have gone to the trouble to specifically set forth what the reasons were.

11. **The opinion.** It is suggested by Appellees that the Court was not bound by its conclusions on the validity of the law. It is said that the Court might have changed its mind by the time of final hearing. Appellees on page 16 say that "if Appellants have any testimony that would show a different state of facts, they have ample opportunity to present the same". A sufficient answer to this statement is that the Court did not even wait for all the testimony upon interlocutory application to be put in before finding facts and declaring the Act unconstitutional. See page 38, Appellants' original brief. Appellees concede on page 15 that the opinion of the Court contained "findings of fact and conclusions of law" and even Appellees do not contend in their brief that such facts were found solely in connection with the motion for interlocutory injunction. It is too obvious for comment that such facts were found upon the merits of the case and were so applied.

Appellees are at a loss to explain why the Court wrote its opinion finding facts and declaring the law unconstitutional before even the facts were all in. Appellees frankly say (on page 23) that they "do not know what happened" but they "surmise" that the Court wrote its opinion and merely held it until after all the motion evidence was in. Appellees refer to such procedure mildy as "an irregularity". But why the Court would even presume to write its opinion finding the facts and declaring the State Act unconstitutional, before all the facts were in, is not explained. An adjudication of fact is supposed to be a very deliberate

matter involving the exercise of judgment and a careful weighing of all the evidence. The striking down of a State law by the Federal Court is supposed to be a very serious undertaking. Some of the criticism which Appellees mistakenly direct to the Commission with reference to not taking "much time" to sufficiently perform its duties might with more propriety be urged to the writing of the opinion by the Court, if we accept the Appellees' "surmised" version of how it happened.

12. **The evidence.** Appellees on page 23 refer to the language "unusual, undignified and cumbersome" used by appellants in their original brief, but appellees use the phrase in an entirely different manner than used by appellants. Appellants characterized, with the quoted language, the action of the Court in permitting oral testimony at the interlocutory hearing. Appellees mistakenly claim that it was used to characterize *what the evidence showed.*

Appellees make no attempt to answer the argument made in appellees' brief, pages 41 to 49, that the facts found by the Court lacked support in the evidence. At the risk of being harsh, appellants would suggest that the paucity of argument on the point is brought about solely by the range of possibility permitted. One reference in appellees' brief, page 22, to the evidence in the case we particularly desire to point out to the Court. Appellees say that "Mr. Polk shows clearly that it was impossible for any canning plant to tell what profit it had made until the season had been completed, and the finished product sold and disposed of" (R. 73). Thus appellees, by their own construction of their evidence, effectually put out of the case all the argument about the appellees having to close their plants because of "tremendous losses". It would seem also that such fact would destroy appellees' contention that the Court issued the interlocutory order to save the canners "irreparable loss". Why would the canners have to close up because of

serious loss if they would not know until the end of the season whether they would in fact sustain any loss? Secondly, the very fact that they would have to wait until the end of the season, as stated by Mr. Polk and conceded by appellees in their brief, presupposes the fact *that the canners would remain open.*

Conclusion.

We again apologize for the length of appellants' original and reply briefs. The task of keeping the record straight, the lower Court straight, appellees straight, and possibly ourselves straight, has compelled the unravelling of many tangled skeins, which otherwise might have been unnecessary. Appellants trust that from the confusion this Court may add a valuable precedent to the nation's jurisprudence by holding valid the Act under attack and thereby also going a long way toward permitting the States to remedy much of the agricultural ills of this country.

Respectfully submitted,

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APPENDIX "A"

Grower's Cost Guarantee Law, Chapter No. 16862, Laws of Florida, Acts of 1935.

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare, and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefor hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this State to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in con-

nection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare, Be It Enacted by the Legislature of the State of Florida:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost

of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan or arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provision of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

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